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The Commonwealth of Massachusetts
Executive Office of Public Safety
Fire Safety Commission
Automatic Sprinkler Appeals Board
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MAURICE M. PILETTE
CHAIRMAN

PAUL DONGA
VICE CHAIR

Docket # 2005-30
226 East Main Street
Fall River, MA.

AUTOMATIC SPRINKLER APPEALS BOARD
DECISION AND ORDER

A) Statutory and Regulatory Framework

This is an administrative appeal held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G1/2 and Chapter 6, section 201, relative to a determination of the Fall River Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and/or operated by Xcape Inc. (hereinafter referred to as the Appellant). The building, which is the subject of the order, is known as Xcape. It is located at 226 East Main Street, Fall River, MA.

B) Procedural History

By oral communication then by a written notice dated 5-15-05, the Fall River Fire Department issued an Order of Notice to the Appellant informing it of the provisions of M.G.L c. 148, s.26G1/2, which requires the installation of an adequate system of automatic sprinklers in certain buildings or structures. The building subject to the order is located at 226 East Main Street, Fall River, Ma. The Appellant filed an appeal of said order on 5-4-05 and the Board held a hearing relative to this matter on August 4, 2005, at the Department of Fire Services, Stow, Massachusetts.

Mr. Jose Gouveia, owner, appeared on behalf of the Appellant. Deputy Chief William Silvia appeared on behalf of the Fire Department.

Present for the Board were Maurice M. Pilette, Chairperson, Edward G. McCann, Paul Donga, Thomas Coulombe, Stephen D. Coan and Brian Gore. Peter Senopoulos was attorney for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Fall River Fire Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G1/2?

D) Evidence Received

1. Application for Appeal
2. Request for an Appeal
3. Order of Notice from the Fire department
4. Notice of hearing to Appellant
5. Notice of hearing to Fire Department
6. Certificate of Inspection
- 7A Photograph of exterior of the building
- 7B Photograph of interior of the building
8. Floor Plan

E) Subsidiary Findings of Fact

- 1) By Notice dated 5-4-05 the Fall River Fire Department issued a written Order of Notice to the Appellant requiring the installation of an adequate system of automatic sprinklers in a building located at 226 East Main Street, Fall River, MA. in accordance with the provisions of M.G.L. c. 148, s.26G1/2. Said notice indicated that the Appellant's building was subject to the provisions of said s.26G1/2.
- 2) The building is a two floor wooden structure that houses, on the first floor, an establishment named "Xcape". There are five apartments located on the second floor. The Certificate of Inspection issued for the building on 12-31-04 indicates that the first floor "Bar area" has a capacity of 33 persons. The "Dining area" has a capacity of 150 persons. However, currently there is no physical separation between the bar or lounge area and any restaurant area. The establishment consists of one large free flowing area with hard wood flooring. There is a bar in one corner, a disc jockey booth, and a simple raised platform or stage area used for live entertainment set up.

- 3) The Appellant's business has been issued a license for dancing and entertainment and for full liquor service. Testimony indicates that the establishment usually operates from 12:00 noon until 1:00 am Monday through Thursday and from 12:00 noon until 2:00 on Fridays and Saturdays. There was a photograph of an advertisement poster which was posted on the front door of the establishment indicating the appearance of several live musical entertainment artists for viewing and dancing purposes. The photograph indicated that such appearances at the establishment were planned for each Saturday night during the month of August, 2005. Tickets are purchased and/or a fee is charged for such entertainment. There was testimony that this entertainment and the music by disc jockey is provided routinely and regularly throughout the year for the entertainment of guests for viewing or dancing purposes.
- 4) The Appellant testified that he originally bought the establishment for use as a restaurant. However, he indicated that the business plan has changed and now the business is more focused providing entertainment and liquor. Although food is still available for customers, the appellant indicated that the breakdown of food and liquor is as follows: 70% liquor and 30% food. There is no fixed seating for dining purposes.
- 5) The Appellant indicated that he has obtained verbal estimates from contractors who stated that the cost to install an adequate sprinkler system would be between \$30,000. and \$40,000. dollars. The Appellant indicated that the business has not been lucrative and that payment of the cost to install a sprinkler system would be difficult. The Appellant indicated that the number of patrons rarely exceeds 100. The Appellant did not request that this Board consider a modified system nor did the Appellant request an extension of time to install said system.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The subject building is considered a public assembly with a capacity of 100 persons or more.
- 2) The provisions of the 2nd paragraph of M.G.L. c. 148, s. 26G1/2, in pertinent part states: " every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque, bar, or similar entertainment purposes...(a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout with an adequate system of automatic sprinklers in accordance with the state building code". The law was effective as of November 15, 2004.
- 3) The statutory timeline for said sprinkler installation in accordance with the provisions of section 11, St. 2004, c.304, requires the submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and complete installation within 3 years of the effective date of the act (by November 15, 2007).

- 4) In a memorandum dated 1-10-05, this Board issued an interpretive guidance document relative to the provisions of this new law found in c.148, s.26G1/2. This new law was a portion of a comprehensive legislative initiative undertaken as the result of a tragic Rhode Island nightclub fire which took place in February 2003. In said memorandum, this Board noted that the statute did not contain a definition of the words “nightclub, dance hall, discotheque, bar or similar entertainment purposes”. This Board reviewed the legislative intent and background of the statute and concluded that there were certain characteristics typical of nightclubs, dancehalls and discotheques. The board indicated that such occupancies are characterized, but not limited to, the following factors:
- a) No theatrical stage accessories other than raised platform;
 - b) Low lighting levels;
 - c) Entertainment by a live band or recorded music generating above-normal sound levels;
 - d) Later-than-average operating hours;
 - e) Tables and seating arranged or positioned so as to create ill defined aisles;
 - f) A specific area designated for dancing;
 - g) Service facilities primarily for alcoholic beverages with limited food service; and
 - h) High occupant load density.

It was the interpretation of this board that such characteristics are typical of the “A-2 like” occupancy (which was a general reference to the A-2 use group referenced in 780 CMR, The State Building Code) and that these are the type of factors that heads of fire departments should consider in enforcing the sprinkler mandates of M.G.L. c.148, s.26G1/2. It was noted that the list of characteristics was not necessarily all-inclusive. Additionally, the factors may be applied individually or in combination depending upon the unique characteristics of the building at the discretion of the head of the fire department.

- 5) Based upon the evidence provided at the hearing it is clear that this facility, as currently operated is routinely used and currently designed for occupancy as a night club, dance hall, discotheque, bar, or similar entertainment purposes and is therefore within the scope of the sprinkler requirements of M.G.L. c.148, s.26G1/2. This establishment is regularly and routinely used for the “A-2 like” activities” described in this Board’s memorandum dated 1-10-05. The board notes that the apparent change in use of this establishment from a restaurant to a night club type operation has not been properly reflected in the records of the building department. The Board is concerned with this change in “use” without following appropriate building code requirements. However, this Board lacks jurisdiction to enforce such building code requirements.

- 6) The Appellant's contention that the establishment rarely hosts over 100 persons has no bearing on this case. The provisions of s. 26G1/2 uses the word "capacity" in establishing the numerical 100 person threshold which triggers the sprinkler requirements. In determining this number the Board looks at the current rated capacity as reflected in annual certificate of inspection. This indicates the legal number of persons who can legally occupy the building.

G. Decision and Order

Based upon the aforementioned reasoning and the evidence presented at the hearing, the Board unanimously upholds the Order of the Fall River Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G1/2 and further orders the installation in accordance with statutory timeline:

1. The submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and
2. Complete installation within 3 years of the effective date of the act (by November 15, 2007).

H) Vote of the Board

Maurice Pilette, (Chairperson)	In favor
Brian Gore	In favor
Paul Donga	In favor
Edward G. McCann	In favor
Stephen D. Coan	In favor
Thomas Coulombe	In favor

I) Right of Appeal

You are hereby advised that you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,

A handwritten signature in black ink, appearing to read "Maurice Pilette", written in a cursive style.

Maurice Pilette, P.E.. Chairman

Dated: August 17, 2005

A copy of this Decision and Order was forwarded by certified mail, return receipt requested, to Mr. Jose Gouveia, 226 East Main Street., Fall River, MA. 02724 and by 1st class mail, postage prepaid, to: Deputy Chief William Silvia, Fall River Fire Department, 140 Commerce Drive, P.O. Box 749, Fall River, MA. 02720-0740